Rayston Resources Sdn Bhd v LGB Engineering Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCC-51–06 OF 2017
VAZEER ALAM J
22 JULY 2019

Companies and Corporations — Shares — Transfer of shares — Defendant transferred shares in breach of articles of association — High Court and Court of Appeal decided transfer of shares null and void — Company could ratify void resolution — Issuance and subscription of shares null and void

Prior to 15 December 2014, the shareholders of Rayston (Butterworth) Sdn Bhd ('the second defendant') consisted of Rayston Resources Sdn Bhd ('the plaintiff') holding 17% of the shares and LBG Engineering Sdn Bhd ('the first defendant') holding 83% of the shares. On or around 15 December 2014, the first defendant transferred and disposed one share ('the impugned transfer') from the second defendant to LGB Utilities Sdn Bhd ('LGB Utilities') without first offering the same to the plaintiff, in breach of article 1 of the second defendant's articles of association. In the plaintiff's application via Originating Summons No 22NCC-2–04 of 2015 ('the first originating summons'), the High Court made an order that the impugned transfer was null and void and that the register was to be rectified accordingly. The High Court also ordered that all resolutions passed by the second defendant during its extraordinary general meeting on 24 February 2015 and any resolutions passed at subsequent extraordinary general meeting where LGB Utilities was present and voted in its purported capacity as a shareholder of the second defendant, were equally null and void. The first defendant's appeal to the Court of Appeal was dismissed, except for the issue of damages to be paid by the fourth to seventh defendants ('the COA order'). A notice of motion was filed by the first defendant and LGB Utilities in the Federal Court for leave to appeal against the Court of Appeal's order but was later withdrawn. On 22 February 2017, the first defendant wrote to the board of directors of the second defendant to request that the second defendant circulated a members' written resolution ('the impugned resolution'), pursuant to s 303 of the Companies Act 2016 to ratify the void resolutions. The plaintiff contended that the passing of the impugned written resolution using the shares held by the first defendant in the second defendant to ratify the resolutions that were declared as null and void was a direct contravention of the High Court judgment and the Court of Appeal's order. The defendant then contended that: (a) they were entitled in law to use s 303 of the Companies Act 2016 to have the impugned written resolution passed

and ratified the earlier impugned resolutions; and (b) the application was motivated by collateral purpose. A

Held:

(1) It was found that the plaintiff had successfully established its case for the relief sought. It was trite that a nullity could not be cured. The impugned written resolution that sought to effectively ratify the void resolutions by applying the provisions of s 303 of the Companies Act 2016 was void as it was in direct contravention of the orders of the High Court and the Court of Appeal which were final and effective between parties. The second defendant could not retrospectively ratify something which the courts had declared as void by the use of subsequent statutory provisions. When substantive rights of parties were changed by statute, then such rights could only have prospective application. It could not be used retrospectively unless the statute specifically provided for the same. There was no specific provision for the retrospective application of the fresh rights contained in s 303 of the Companies Act 2016. The purported ratification of the impugned resolutions by use of s 303 of the Companies Act 2016 was improper and unlawful (see paras 20, 23 & 26–27). B C D

(2) Since the first extraordinary meeting had been declared null and void, it would follow that there was no such prior approval obtained by the directors of the second defendant before the issuance of shares thus breaching s 132D(1) of the Companies Act 1965. Without the prior approval of the members, the allotment of shares by the second defendant was clearly done in breach of the express provision in s 132D of the Companies Act 1965 that mandated prior approval of the second defendant in a general meeting (see paras 30–31). E F

(3) Since the fourth extraordinary meeting was declared null and void, it would follow that there was no shareholders' approval obtained in the second defendant before the subscription of shares, thus breaching s 132C(1) of the Companies Act 1965. Hence, the impugned written resolution concerning the acquisition of the third's defendant's ordinary shares was void for contravention s 132C(1) of the Companies Act 1965 (see para 34). G H

[Bahasa Malaysia summary

Sebelum 15 Disember 2014, pemegang-pemegang saham untuk Rayston (Butterworth) Sdn Bhd ('defendan kedua') yang merupakan Rayston Resources Sdn Bhd ('plaintif') memegang 17% saham dan LBG Engineering Sdn Bhd ('defendan pertama') memegang 83% saham. Pada atau sekitar 15 Disember 2014, defendan pertama telah memindahkan dan melupuskan satu saham ('saham yang disyaki') daripada defendan kedua ke LGB Utilities Sdn Bhd ('LGB Utilities') tanpa menawarkan dahulu kepada plaintif, I

memungkiri artikel 1 artikel persatuan defendan kedua. Dalam permohonan plaintif melalui Saman Pemula No 22NCC-2–04 Tahun 2015 ('saman pemula pertama'), Mahkamah Tinggi telah mengarahkan saham yang disyaki adalah tidak sah dan terbatal dan pendaftaran tersebut perlu diperbetulkan. Mahkamah Tinggi juga mengarahkan segala resolusi yang telah diluluskan pada mesyuarat agung luar biasa di mana LGB Utilities telah hadir dan mengundi sebagai pemegang saham untuk defendan kedua adalah tidak sah dan terbatal juga. Rayuan defendan pertama kepada Mahkamah Rayuan telah gagal kecuali untuk isu ganti rugi perlu dibayar oleh defendan-defendan keempat sehingga ketujuh ('arahan COA'). Notis permohonan telah difailkan oleh defendan pertama dan LGB Utilities melalui Mahkamah Persekutuan untuk kebenaran rayuan terhadap perintah Mahkamah Rayuan namun kemudiannya ditarik balik. Pada 22 Februari 2017, defendan pertama menulis kepada ahli lembaga pengarah defendan kedua untuk memohon defendan kedua mengedarkan resolusi bertulis ahli ('resolusi yang disyaki') melalui s 303 Akta Syarikat 2016 untuk membenarkan resolusi-resolusi yang telah terbatal. Plaintif berhujah bahawa pengedaran resolusi yang telah disyaki menggunakan saham-saham yang telah dipegang oleh defendan pertama di dalam defendan kedua untuk membenarkan resolusi-resolusi yang telah diarahkan tidak sah dan terbatal adalah melanggar arahan langsung Mahkamah Tinggi dan arahan Mahkamah Rayuan. Defendan berhujah bahawa: (a) mereka berhak di bawah undang-undang untuk menggunakan s 303 Akta Syarikat 2016 untuk menggunakan resolusi yang disyaki untuk meluluskan dan membenarkan resolusi-resolusi yang disyaki sebelum ini; dan (b) permohonan adalah bermotivasikan niat untuk mendapatkan cagaran.

Diputuskan:

(1) Mendapati bahawa plaintif telah berjaya membuktikan kesnya untuk relif yang dipohon. Kebiasaannya, pembatalan tidak boleh diperbaiki. Resolusi yang disyaki yang telah dipohon untuk membenarkan secara efektif resolusi-resolusi yang telah terbatal dengan menggunakan peruntukan s 303 Akta Syarikat 2016 adalah terbatal kerana ia adalah melanggar arahan langsung Mahkamah Tinggi dan arahan Mahkamah Rayuan yang merupakan muktamad dan dikuatkuasakan untuk pihak-pihak yang berkaitan. Defendan kedua tidak boleh secara retrospektif membenarkan sesuatu yang telah diputuskan oleh mahkamah sebagai terbatal dengan menggunakan peruntukan undang-undang yang kemudiannya digubal. Apabila hak-hak substantif pihak-pihak terlibat telah bertukar atas alasan undang-undang, maka hak-hak tersebut hanya boleh digunapakai secara permohonan prospektif. Ia tidak boleh digunapakai secara retrospektif melainkan undang-undang tersebut dengan spesifik membolehkan perkara tersebut. Tiada peruntukan spesifik untuk permohonan retrospektif untuk hak-hak yang baru yang di bawah s 303 Akta Syarikat 2016.

Kebenaran yang telah diletakkan di dalam resolusi yang disyaki dengan menggunakan s 303 Akta Syarikat 2016 adalah tidak wajar dan salah (lihat perenggan 20, 23 & 26–27)

(2) Sejak mesyuarat extraordinary pertama yang telah diisytihar sebagai tidak sah dan terbatal, maka tiada kebenaran untuk pengarah-pengarah defendan kedua untuk mengisukan saham-saham maka melanggar s 132D(1) Akta Syarikat 1965. Tanpa kebenaran daripada ahli-ahli, bahagian saham-saham oleh defendan kedua dengan jelas telah dilakukan dengan memungkiri peruntukan yang nyata di bawah s 132D Akta Syarikat 1965 yang telah dimandatkan sebelum kebenaran defendan kedua di dalam mesyuarat agung (lihat perenggan 30–31)

(3) Defendan ketiga adalah terbatal kerana bertentangan dengan s132C(1) Akta Syarikat 1965 (lihat perenggan 34)]

Cases referred to

Bauer (Malaysia) Sdn Bhd v. Jack-In Pile (M) Sdn Bhd & Another Appeal [2018] 4 MLJ 640; [2018] 10 CLJ 293, CA (refd)

Ho Num Chon & Anor v Tech-Lab Scientific Sdn Bhd & Ors [2016] MLJU 451; [2016] 1 LNS 686, HC (refd)

Jigarlal Kantilal Doshi v Amanah Raya Bhd (as the administrator of the estate of the late Kantilal Prabhulal Doshi, deceased) and other appeals [2014] 6 MLJ 629, CA (refd)

Khoo Choon Yam v Gan Miew Chee @ Gan Khuan Poh & Ors [2000] 6 MLJ 20; [2000] 2 CLJ 788, HC (refd)

National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)

Penang Development Corp v Teoh Eng Huat & Anor [1992] 1 MLJ 749, HC (refd)

Pritchard (deceased), Re [1963] 1 All ER 873 (refd)

Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi @ Saw Boon Kooy (deceased)) & Ors [2008] 1 MLJ 27, CA (refd)

Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) ss 132C, 132C(1), 132D, 132D(1), 147, 150

Companies Act 2016 ss 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308)

Christopher Leong (Kenneth Koh & Charles Chong with him) (Chooi & Co + Cheang & Ariff) for the plaintiff.

Logan B Sabapathy (Carmelia Cheong & Ariel Priyanka Francis with him) (Logan Sabapathy & Co) for the defendant.

Vazeer Alam J:

[1] The facts giving rise to application by the plaintiff are well set out in the written submissions of solicitors for the plaintiff and I have adopted them is part. Prior to 15 December 2014, the shareholders of the second defendant ('RBSB') were:

(a) the plaintiff holding 17% of the shares; and

(b) the first defendant ('LGBE') holding 83% of the shares.

[2] On or around 15 December 2014, the first defendant ('LGBE') transferred and disposed ('impugned transfer') one share in RBSB to LGB Utilities Sdn Bhd ('LGB Utilities'), without first offering the same to the plaintiff, in breach of article 1C of RBSB's Articles of Association.

[3] As the impugned transfer was in breach of the Articles of Association of RBSB, on the application of the plaintiff in another originating summons, ie Shah Alam High Court Originating Summons No 22NCC-2–04 of 2015 ('first OS'), the High Court made an order on 17 March 2016 that the impugned transfer is null and void, and that the register be rectified accordingly ('High Court judgment').

[4] In addition to the impugned transfer being declared null and void, the High Court judgment further declared that all resolutions passed at the extraordinary general meeting of RBSB on 24 February 2015, and any and all other resolutions as may be passed at subsequent extraordinary general meetings of RBSB where LGB Utilities would have been present and voted in its purported capacity as a shareholder of RBSB, are equally null and void ('void resolutions').

[5] All in all, there were five members meetings of RBSB where LGB Utilities was present and the following resolutions passed:

No	Date	Resolutions
1	24 February 2015 11am ('first EGM')	That the authorised share capital of RBSB be increased from RM100,000 divided into 100,000 ordinary shares of RM1 each to RM10m divided into 10,000,000 ordinary shares of RM1 each by the creation of an additional 9,900,000 ordinary shares of RM1 each and these shares shall rank pari passu in all respects with the existing shares in the capital of the second defendant ('allotment of RBSB shares'); and

No	Date	Resolutions
		That authority be given to the directors of RBSB to allot and issue shares pursuant to s 132D of the Companies Act 1965 as and when they deemed fit and proper until the conclusion of the next annual general meeting.
2	24 February 2015 11.30am ('second EGM')	That authority be and is hereby given to the company to subscribe for 5,280,000 ordinary shares of RM1 each in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB.
3	28 May 2015 ('third EGM')	That the transfer of one ordinary share from LGB Utilities to the first defendant as approved by the board of directors at the board meeting on 3 November 2014 be confirmed as a contrary direction had under article 1C with effect from 3 November 2014; and That the proposed alterations, modification, additions or deletions to the Articles of Association of RBSB be approved.
4	28 October 2015 ('AGM')	That Mr Phang Kwai Sang ('fifth defendant'), a director of the company who retires by rotation in accordance with article 63C and being eligible has offered himself for re-election be and is hereby re-elected as director of the company; That Mr Tai Kok Hong (seventh defendant), a director of the company who retires by rotation in accordance with article 63C and being eligible has offered himself for re-election be and is hereby re-elected as director of the company; and

No	Date	Resolutions
		That Messrs Leslie Yap & Co, the retiring auditors be and are hereby re-appointed as auditors of the company to hold office until the conclusion of the next annual general meeting and to authorise the directors of the company to fix their remuneration.
5	27 January 2016 ('fourth EGM')	That authority be and is hereby given to the company to subscribe for 5,279,998 ordinary shares of RM1 each in RCBSB and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB.

[6] LGBE appealed the High Court judgment to the Court of Appeal, and on 15 November 2016, the Court of Appeal dismissed LGBE's appeal, save on the issue of damages to be paid by the fourth to seventh defendants ('the COA order').

[7] On 5 December 2016, LGBE and LGB Utilities filed a notice of motion in the Federal Court for leave to appeal against the COA order ('the leave application'). However, on 9 May 2017 the leave application was withdrawn by LGBE and LGB Utilities.

[8] On 8 December 2016, LGBE, the fourth to seventh defendants and LGB Utilities filed a notice of motion in the Court of Appeal ('Stay & Court Convened EGM Application') for the following orders:

(a) a stay of the COA order and the High Court judgment; and

(b) that an extraordinary general meeting of RBSB be convened by the board of RBSB as soon as possible for its shareholders to inter alia ratify and reinstate all resolutions passed at extraordinary general meetings of RBSB held from 24 February 2015 to the time of the filing of the application without requiring the attendance of the corporate representative or proxy of the plaintiff.

[9] However, on 9 March 2017, LGBE, the fourth to seventh defendants and LGB Utilities withdrew the Stay & Court Convened EGM Application, and accordingly it was struck out with cost ('Stay & Court Convened EGM Order').

[10] On or about 22 February 2017, LGBE wrote to the board of directors

of RBSB to request that RBSB circulates a members' written resolution, pursuant to s 303 of the Companies Act 2016 to 'inter alia' ratify the void resolutions. Then, on 23 February 2017, RBSB wrote to LGBE and the plaintiff, enclosing the Members' Written Resolution No 1 of 2017 ('impugned written resolution') which sets out the resolutions to effectively ratify the void resolutions.

[11] The resolutions contained in the impugned written resolution are as follows:

No	Impugned Written Resolution of RBSB	Ratifying Void Resolution
1	That approval be and is hereby given to RBSB with effect from 24 February 2015 to increase its authorised share capital from RM100,000 divided into 100,000 ordinary shares of RM1 each to RM10m divided into 10,000,000 ordinary shares of RM1 each by the creation of an additional 9,900,000 ordinary shares of RM1 each and these shares shall rank pari passu in all respects with the existing shares in the capital of the second defendant.	First EGM
2	That authority be and is hereby given to the directors of RBSB with effect from 24 February 2015 to allot and issue shares pursuant to s 132D of the Companies Act 1965 as and when they deemed fit and proper until the conclusion of the next annual general meeting.	First EGM
3	That authority be and is hereby given to RBSB with effect from 24 February 2015 to subscribe for 5,280,000 ordinary shares of RM1 each in RCBSB and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB.	Second EGM
4	That contrary direction be and is hereby given under article 1C of the Articles of Association of RBSB with effect from 3 November 2014 for the transfer of one ordinary share from LGBE to LGB Utilities.	Third EGM

No	Impugned Written Resolution of RBSB	Ratifying Void Resolution
5	That Mr Phang Kwai Sang ('fifth defendant'), a director of RBSB who retires by rotation in accordance with article 63C and being eligible has offered himself for re-election be and is hereby re-elected as director of RBSB with effect from 28 October 2015.	AGM
6	That Mr Tai Kok Hong ('seventh defendant'), a director of RBSB who retires by rotation in accordance with article 63C and being eligible has offered himself for re-election be and is hereby re-elected as director of RBSB with effect from 28 October 2015.	AGM
7	That Messrs Leslie Yap & Co, the retiring auditors be and are hereby re-appointed as auditors of RBSB to hold office until the conclusion of the next annual general meeting and to authorise the directors of RBSB to fix their remuneration.	AGM
8	That authority be and is hereby given to RBSB with effect from 27 January 2016 to subscribe for 5,279,998 ordinary shares of RM1 each in RCBSB and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB.	Fourth EGM

[12] Upon receiving the said notice of 23 February 2017, the plaintiff had vide several letters objected to the impugned written resolution as it clearly sought to ratify the void resolutions, which had been declared null and void under the High Court judgment and the COA order. However, RBSB replied stating that it is in the interest of RBSB that the void resolutions be reconsidered and approved as a matter of urgency.

[13] LGBE executed and approved the impugned written resolution, and by virtue of the size of LGBE's shareholding in RBSB, the impugned written resolution was deemed to have been passed despite the plaintiff's objection to the same.

PLAINTIFF'S CONTENTION

[14] The plaintiff contends that following the withdrawal of the leave application at the Federal Court and the Stay & Court Convened EGM Application at the Court of Appeal, the High Court judgment and COA order are valid and subsisting to date, which means that the impugned transfer is null and void and all resolutions passed at the extraordinary general meeting of RBSB on 24 February 2015, and any and all other resolutions as may be passed at subsequent extraordinary general meetings of RBSB where LGB Utilities would have been present and voted in its purported capacity as a shareholder of RBSB, are equally null and void. Hence, the plaintiff argues that passing of the impugned written resolution using the shares held by LGBE in RBSB to ratify the resolutions that have been declared as null and void is a direct contravention of the High Court judgment and the COA order.

[15] As such, the plaintiff filed this originating summons seeking the following relief:

(a) that the second defendant cancel and/or reverse the second defendant's allotment of 5,280,000 ordinary shares of RM1 or any part thereof each to the first defendant and/or any other parties pursuant to the second defendant's resolution passed at its extraordinary general meeting on 24 February 2015 at 11am ('the allotment of RBSB shares') and that the share register of the second defendant, the books and records of the second defendant and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(b) that the second defendant cancel and/or reverse its subscription of 5,279,998 ordinary shares of RM1 each in the third defendant pursuant to the second defendant's resolutions passed at its extraordinary general meetings on 24 February 2015 and 27 January 2016 ('the subscription in RCBSB') and that the share register of the second defendant, the books and records of the second defendant and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(c) that the third defendant cancel and/or reverse the third defendant's allotment of 5,279,998 ordinary shares of RM1 each to the second defendant and that the share registers of the second defendant and the third defendant, the books and records of the second defendant and the

A third defendant and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

(d) that the second defendant cancel and/or reverse the following resolutions passed at the second defendant's extraordinary general meeting on 28 May 2015:

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(i) the confirmation of the transfer of one ordinary share or RM1 each from the first defendant to LGB Utilities Sdn Bhd as a contrary direction under article 1C of the second defendant's Articles of Association; and

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(ii) the proposed amendments to the second defendant's articles of association.

(e) that the Members' Written Resolution No 1 OF 2017 of the second defendant which was purportedly passed on 3 March 2017 and which purportedly ratified the items in paras 1.1–1.4 above, be declared invalid, null and void and shall be cancelled and/or reversed;

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(f) an order that all members' resolutions of the third defendant where the second defendant purportedly exercised the voting rights attached to the 5,279,998 ordinary shares of RM1 each in the third defendant from the subscription in the third defendant be cancelled and/or reversed and that the books and records of the second defendant and the third defendant and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

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F (g) that the fourth to seventh defendants as the directors of the second defendant and the third defendant and/or any other directors of the second defendant and the third defendant who replace the fourth to seventh defendants and/or any other directors of the second defendant and the third defendant shall carry out para 1–6 above within one month from the date of the orders made herein;

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(h) that the fourth to seventh defendants as the directors of the second defendant and the third defendant and/or any other directors of the second defendant and the third defendant who replace the fourth to seventh defendants and/or any other directors of the second defendant and the third defendant take all steps to give effect to the orders made herein within one month from the date of the orders made herein; and

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(i) costs.

I THE DEFENDANTS' CONTENTION

[16] The defendants contend that the case put forward by the plaintiff in the first OS was a technical one, namely, breach of the pre-emptive right contained in article 1C of the Articles of Association, when LGBE transferred one RBSB

share to LGB Utilities without first offering the same to the plaintiff. This resulted in the High Court judgment, wherein that transfer of one share was declared null and void, and further all members resolution of RBSB taken with the participation of LGB Utilities was also declared null and void. The defendants state that LGBE had transferred that one RBSB share to LGB Utilities as a means to overcome the frustration of quorum at physical shareholders' meetings of RBSB by the non-attendance of the plaintiff, who was the only other shareholder.

[17] The parties had entered into discussions on a stay of execution of the High Court judgment pending the defendants' appeal to the Court of Appeal. Eventually, on 23 May 2016, the parties recorded a consent order on the stay. The High Court judgment was affirmed in the main by the Court of Appeal.

[18] The defendants state that in the period thereafter, the following were then in play:

(a) on 5 December 2016, the defendants filed an application for leave to appeal to the Federal Court. Then on 8 December 2016, the defendants filed the Stay & Court Convened EGM Application at the Court of Appeal;

(b) on 31 January 2017, the new Companies Act 2016 came into force whereby Part III, Division 5, Sub-Division 2(containing ss 297–308) provided for members' written resolutions which obviated the necessity for quorum at physical shareholders' meetings;

(c) on 8 February 2017, the board of RBSB, having taken legal advice, then resolved that an EGM be convened to reconsider the resolutions that were the subject of the High Court judgment, but this time without the presence of LGB Utilities, the offending shareholder;

(d) on 22 February 2017 LGBE wrote to RBSB to request that it circulate a members' written resolution pursuant to s 303 of the new Companies Act 2016;

(e) on 23 February 2017, RBSB duly circulated the impugned written resolution to LGBE and the plaintiff; and

(f) LGBE signed the impugned written resolution, whilst the plaintiff refused.

The defendants contend that they are entitled in law to use s 303 of the Companies Act 2016 to have the impugned written resolution passed and ratify the earlier impugned resolutions. The defendants further contend that the present application is motivated by collateral purpose, and that if the plaintiff's application were allowed that it would dilute RBSB's shareholdings in the third defendant, RCBSB.

ANALYSIS OF THE ARGUMENTS AND FINDINGS

[19] The plaintiff submits that:

(a) the void resolutions were previously declared null and void by the High Court and the Court of Appeal;

(b) the impugned written resolution which effectively ratified the void resolution are equally invalid, null and void, of no effect, and is in contumacious disregard and disrespectful of the High Court judgment and the COA order;

(c) the subject matter of the proposed resolutions in the impugned written resolution is the same as that of the High Court judgment and the COA order, and as such these matters are rendered res judicata and cannot be ratified by the impugned written resolution; and

(d) in this regard, the plaintiff seeks that the impugned written resolution be reversed, cancelled and/or unwound by the court.

[20] The defendants, however, contend otherwise. The defendants state that LGB Utilities has, in accordance to the High Court judgment and the COA order, retransferred the one offending share in RBSB back to LGBE. And thus it is at liberty to ratify the earlier impugned resolutions that were done in the presence of the offending shareholder, LGB Utilities, using the provisions of s 303 of the Companies Act 2016. Hence, the defendants submit that the impugned written resolution is valid in law and is not in contradiction to the High Court judgment or the COA order.

MY DECISION

[21] Having considered the plaintiff's application in encl 1 and the affidavits filed. And further having considered the written submissions and oral arguments of counsel, I find that the plaintiff has successfully established its case for the relief sought. In particular, I find that by virtue of the High Court judgment and the COA order, all members' resolutions of RBSB passed on 24 February 2015 and any and all resolutions as may be passed at subsequent EGM of RBSB where LGB Utilities was present and voted in its purported capacity as shareholder of RBSB are null and void. In consequence of that, five such resolutions, ie the RBSB Share allotment resolution made on 24 February 2015 ('first EGM'), the RCNSB share subscription resolution made on 24 February 2015 ('second EGM'), the resolution made on 28 May 2015 ('third EGM'), the resolution made on 28 October 2015 ('AGM') and the resolution made on 27 January 2016 ('fourth EGM'), have been declared as null and void. It is trite that a nullity cannot be cured.

[22] In *Re Pritchard (deceased)* [1963] 1 All ER 873 the English Court of Appeal, in reliance of another Privy Council case, had clearly stated that nullity is incurable. The following excerpt is instructive:

> On the other side of the line, but illustrating the proposition that there are some proceedings so defective that they may properly be described as a nullity, *is the case in the Judicial Committee of the Privy Council, MacFoy v United Africa Co Ltd Lord Denning, who delivered the judgment of the Board, dealt with the distinction between a nullity which was wholly void and something which, although improper, was voidable and capable of being cured. He pointed out that if a proceeding is a nullity, it is incurable and cannot be validated by any subsequent act of the parties by waiver or taking some step in the action*. It is unnecessary to have an order setting aside a nullity, although it may be convenient to do so. In that case it was argued that the delivery of a statement of claim in the long vacation was a nullity and invalidated all the subsequent proceedings. One is not surprised to find that the West African Court of Appeal decided that it was a mere irregularity, and that that decision was affirmed in the Privy Council. (Emphasis added)
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> ...
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> The originating summons in this case, therefore, is a nullity and has no operation. It has no more application to the matter to be decided than a dog license. In this situation the provisions of RSC, Ord 70, have no application. The defect cannot be cured.

[23] This principle was reiterated by the Court of Appeal in *Jigarlal Kantilal Doshi v Amanah Raya Bhd (as the administrator of the estate of the late Kantilal Prabhulal Doshi, deceased) and other appeals* [2014] 6 MLJ 629, where the court held that a 'nullity cannot be cured'. It is clear that the impugned written resolution's intent is to give retrospective effect to the void resolutions. Hence, the passing of the same would have the effect of ratifying the void resolutions and curing their nullity. This the cannot be done. See also *Penang Development Corp v Teoh Eng Huat & Anor* [1992] 1 MLJ 749, (HC); and *Khoo Choon Yam v Gan Miew Chee @ Gan Khuan Poh & Ors* [2000] 6 MLJ 20; [2000] 2 CLJ 788.

[24] I further find that the impugned written resolution that seeks to effectively ratify these void resolutions by applying the provisions of s 303 of the Companies Act 2016 is also void as this is in direct contravention to the orders of the High Court and the Court of Appeal contained in the High Court judgment and the COA order, which orders are final and effective between parties.

[25] In addition to that, s 303 of the Companies Act 2016 provides:

> 302 Members' power to require circulation of written resolution
>
> (1) Any member of a private company having a total of five per centum, or such lower per centum as specified in the constitution, of the total voting rights of all

A eligible members may require the company to circulate a resolution that may properly be moved as a written resolution.

Now, prior to the coming into effect of s 303 of the Companies Act 2016, there were no similar provisions in law to have a members' resolution done by way of B circulation of a written resolution to all members. The members had to be physically present at a members meeting to achieve quorum and then transact the business of the meeting. In fact s 147 of the Companies Act 1965 (now repealed and which was subsisting at the time when the impugned resolutions were passed) requires the physical presence of at least two members to achieve C quorum for a members meeting.

[26] If any one member were to frustrate quorum, as is the complaint by LGBE in this case, then any other member could move the court for a court convened meeting in accordance to s 150 of the Companies Act 1965 which D provides:

150 Power of Court to order meeting

If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the E articles or this act the court may, either of its own motion or on the application of any director or of any member who would be entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called, held and conducted in such manner as the court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one F member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting.

LGBE did not avail itself of the provisions in s 150 of the Companies Act 1965, G to consider and pass the now void resolutions. Instead, it went by way of the unlawful transfer of one of its shares in RBSB to LGB Utilities in order to try and circumvent the legal impediment that they faced. And all the subsequent members' resolutions following that, ie the impugned resolutions, are void and have been so declared by the courts.

H

[27] In this regard, I find that RBSB cannot retrospectively ratify something which the courts have declared as void by the use of subsequent statutory provisions. This is because, when substantive rights of parties are changed by statute, in this case the Companies Act 2016, then such rights can only have I prospective application. It cannot be used retrospectively unless the statute specifically provides for the same. See *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99, SC; and *Bauer (Malaysia) Sdn Bhd v. Jack-In Pile (M) Sdn Bhd & Another Appeal* [2018] 4 MLJ 640; [2018] 10 CLJ 293, (CA).

[28] I am of the view that the right to be physically present and be part of a members' meeting, and resolve matters, was a substantive right enshrined in the Companies Act 1965. At the time the impugned resolutions were passed, the plaintiff enjoyed this right. However, this right was subsequently changed by s 303 of the Companies Act 2016. Nevertheless, there is no specific provision for the retrospective application of the fresh rights contained in s 303 of the Companies Act 2016, ie to pass written circular resolution to ratify the now void impugned resolutions retrospectively to a time when the Companies Act 1965 was in force. Hence, I find that the purported ratification of the impugned resolutions by use of s 303 of the Companies Act 2016 is improper and unlawful.

CONTRAVENTION OF SECTIONS 132C AND 132D OF THE COMPANIES ACT 1965.

[29] In addition to the above, I also find the impugned written resolutions in respect of:

(a) the allotment of RBSB's 5,280,000 ordinary shares (pursuant to the passing of the resolution at the first EGM) was in breach of s 132D of the Companies Act 1965; and

(b) the subscription of the third defendant's ('RCBSB') 5,279,998 ordinary shares by RBSB (pursuant to the passing of the resolution at the fourth EGM) was in breach of s 132C of the Companies Act 1965.

Hence, both these impugned resolutions are void for contravention of statute, as explained below.

[30] Section 132D(1) of Companies Act 1965 states:

> Notwithstanding anything in a company's memorandum or articles, the directors shall not, without the prior approval of the company in general meeting, exercise any power of the company to issue shares.

It is clear that s 132D(1) of the Companies Act 1965 provides that prior approval of the company in general meeting is mandatory for the allotment of shares. The rationale is that the directors should not have the power to issue any shares in the original or any increased capital of a company without the prior approval of the company in general meeting. That power would always vest with the shareholders.

[31] The defendants had initially sought to comply with s 132D(1) of the Companies Act 1965 when they included a resolution for approval at RBSB's extraordinary general meeting dated 24 February 2015, as follows:

> Resolved that the authority be given to the directors of the company to allot and issue shares pursuant to s 132D of the Companies Act 1965 as and when they

A deemed fit and proper until the conclusion of the next annual general meeting.

However, since the first EGM has been declared null and void, it would follow that there was no such prior approval obtained by the directors of RBSB before the issuance of shares, thus breaching s 132D(1) of the Companies Act 1965.
B See *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi @ Saw Boon Kooy (deceased)) & Ors* [2008] 1 MLJ 27, (CA); *Ho Num Chon & Anor v Tech-Lab Scientific Sdn Bhd & Ors* [2016] MLJU 451; [2016] 1 LNS 686.

C **[32]** LGBE was at all material times aware that s 132D of the Companies Act 1965 had to be complied with. This can be seen in the wordings of the impugned written resolution, which states as follows:

> That authority be and is hereby given to the directors of the company with effect from 24 February 2015 to allot and issue shares pursuant to s 132D of the
D Companies Act 1965 as and when they deemed fit and proper until the conclusion of the next annual general meeting.

It is clear that the members approval, even if obtained through the impugned written resolution on 3 March 2017, was not obtained prior to the allotment of
E shares concerned, which took place on 30 June 2015. Thus, without the prior approval of the members, the allotment of shares by RBSB was clearly done in breach of the express provision in s 132D of the Companies Act 1965 that mandates prior approval of RBSB in a general meeting.

F **[33]** Now, as to the subscription of the third defendant's ('RCBSB') 5,279,998 ordinary shares by RBSB (pursuant to the passing of the resolution at the fourth EGM), s 132C of the Companies Act 1965 provides that an acquisition of an undertaking or property of substantial value requires the approval of the company in general meeting. Section 132C(1) of Companies
G Act 1965, which was then applicable, reads as follows:

> Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for —
>
> (a) the acquisition of an undertaking or property of a substantial value; or
H
> (b) ... ,
>
> unless the arrangement or transaction has been approved by the company in a general meeting.

I **[34]** It is clear that RBSB's proposed acquisition of 5,279,998 ordinary shares of RCBSB for RM5,279,998 amounts to an acquisition of substantial value, being more than 25% of the total assets of RBSB at that material time (ie RM10m pursuant to RBSB's authorised share capital subsequent to the invalid resolution passed in the first EGM). Hence, the approval of RBSB's

shareholders in general meeting is mandatory pursuant to s 132C(1) of Companies Act 1965.

[35] It is evident that RBSB was aware of this statutory requirement as RBSB had initially sought to comply with s 132C of the Companies Act 1965 when it had included a resolution for approval at RBSB's fourth EGM dated 27 January 2016, as follows:

> That authority be and is hereby given to RBSB with effect from 27 January 2016 to subscribe for 5,279,998 ordinary shares of RM1 each in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB.

However, since the fourth EGM was declared null and void, it would follow that there was no shareholders' approval obtained in RBSB before the subscription of shares in RCBSB, thus breaching s 132C(1) of the Companies Act 1965. Hence, the Impugned Written Resolution concerning the acquisition of the third defendant's ('RCBSB') 5,279,998 ordinary shares by RBSB is void for contravention of s 132C(1) of the Companies Act 1965. See *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301, (FC).

[36] Similar to the mandatory requirement of prior approval for allotment of shares (s 132D), the defendants were at all material times aware that s 132C of the Companies Act 1965 had to be complied with. This can be seen in the wordings of the impugned written resolution, which states as follows:

> That authority be and is hereby given to the company with effect from 27 January 2016 to subscribe for 5,279,998 ordinary shares of RM1 each in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB.

In this regard, I agree with plaintiff's submissions that even if the approval was obtained through the impugned written resolution on 3 March 2017, the mandatory shareholder approval was not obtained prior to RBSB's subscription of shares on 24 February 2016.

JUDGMENT AND ORDERS

[37] In respect of relief sought, learned counsel for the plaintiff submitted and prayed for consequential orders in relation to the relief under prayer (6), by virtue of the 'further and/or other' orders in prayer (10) of encl 1. These consequential orders are as stated in paras 16.1 and 16.2 of the plaintiff's submissions on relief against the third defendant. The consequential orders are merely to specify the resolutions that the defendants have passed pursuant to the rights attached to the impugned 5,279,998 shares in RCBSB which needs to be reversed or cancelled pursuant to any orders under prayer (6). I found

merit in having the consequential orders made as it adds clarity and makes the main orders clear as to what needs to be done by the parties.

[38] Wherefore, I allowed the orders sought for in prayers (1), (2), (3), (4), (5), (6) and (11) of encl 1 with cost. And in consequence to prayer (6) that had been granted, for purpose of clarity I also granted the specific prayers as contained in paras 16.1 and 16.2 of the plaintiff's submissions on relief against the third defendant, that is:

(a) an order that the second defendant cancel and/or reverse its subscription of 14,400,000 ordinary shares of RM1 each in the third defendant and that the share register of the second defendant, the books and records of the second defendant and all and any documents and records recording the same in whatsoever manner be rectified accordingly all actions and/or steps taken by the second defendant in exercising the voting rights attached to the 14,000,000 ordinary shares of RM1 each in the third defendant be cancelled and/or reversed and that all books and records recording the said actions and/or steps, be rectified accordingly; and

(b) that the third defendant cancel and/or reverse the third defendant's allotment of 14,000,000 ordinary shares of RM1 each to the second defendant and that the share registers of the second defendant and the third defendant, the books and records of the second defendant and the third defendant and all and any documents and records recording the same in whatsoever manner be rectified accordingly.

[39] As for cost, following submissions, cost was fixed at RM40,000 to be borne by the defendants jointly and severally.

Order accordingly.

Reported by Mohd Kamarul Anwar